SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 16.

THE ATHERTON MILLS, APPELLANT,

vs.

EUGENE T. JOHNSTON, JOHN W. JOHNSTON, BY EUGENE T. JOHNSTON, HIS NEXT FRIEND.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR APPELLEES ON REARGUMENT.

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Counsel for Appellees.

(27,161)

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There will be discussed in this brief only the question of the jurisdiction of the District Court. There are two principal reasons for this. Since the former argument the employee on whose behalf the suit was brought has passed the age of sixteen, and upon that circumstance the learned

Solicitor General predicates the conclusion that the case has become moot.

The constitutional question involved is discussed fully in Bailey *v.* Drexel Furniture Company, No. 657, the same counsel appearing in both cases.

Notwithstanding the force of the contention of the Solicitor General that this case has become moot, in obedience to the order of the court restoring the case to the docket for reargument, a brief discussion of the jurisdiction of the District Court will be undertaken.

I.

The Complaint States a Case Cognizable in the District Court.

In the District Court and in the brief filed by the Government on the first argument in this court, the suggestion of the want of jurisdiction was based upon (1) the absence of an allegation in the complaint of a contract of employment under which the employer was not at liberty to discharge the plaintiff for any reason it saw fit to act upon, and (2) that the case was not one arising under the revenue or other Federal laws.

The two objections noted present the question of jurisdiction in two aspects, viz., Federal jurisdiction and equity jurisdiction.

The method adopted to test the validity of this enactment is a suit in equity by an employee between the ages of 14 and 16 and his father, who under the local law is entitled to his son's wages, against the son's employer to enjoin the

latter from discharging the minor employee on account of the statute, when but for the statute the son would be permitted to remain at work, although the employment is at will.

It is alleged in the complaint that the statute is unconstitutional and that because of the existence of the statute, and solely because thereof, the defendant had determined, and so notified plaintiffs on or about April 12, 1919, that it would discharge from its employment all employees under the age of 16 on or before the effective date of the statute, which was April 25, 1919.

The defendant answered the complaint, admitting all of its allegations except that of the invalidity of the statute, which allegation it denied.

When the complaint was filed, notice was given by the plaintiffs and the defendant of the suit to the Commissioner of Internal Revenue, the Solicitor General, and the United States Attorney for the district in which the suit was pending.

The District Attorney appeared at the hearing as *amicus curiæ* and suggested the want of jurisdiction.

When the case was docketed in this court, its management and control was placed in the hands of the Solicitor General by the appellant.

The validity of this proceeding as a means of testing the statute is, we submit, sustained by four propositions:

(1) That it is a case arising under a "law providing for internal revenue."

(2) That the minor appellee, as a wage-earner, hath a legal right that his means of earning a livelihood shall not be wrongfully interferred with, either directly or indirectly.

(3) That as a necessary consequence thereof, and an incident inseparable to that right, he must have a remedy to assert, vindicate, and maintain it.

(4) That this is the only remedy open to appellee and is the proper remedy, being supported by the ground, reason, and principles of the common law.

1a.

The Complaint States a Case under Paragraph 5 of Section 24 of the Judicial Code.

To sustain the jurisdiction in this respect the appellees rely on paragraph 5, the effect of which is that the District Court shall have jurisdiction, without regard to the citizenship of the parties and of the amount in controversy, of

> "all cases arising under any law providing for internal revenue." * * *

The term "revenue law" here means a law providing in terms for revenue—that is to say, a law which purports to be enacted under the power granted to Congress by section 8, article 1, of the Constitution.

U. S. *v.* Hill, 123 U. S., 681, 686.

Bryant Bros. Co. *v.* Robinson, 149 Fed., 321.

U. S. *v.* Hopewell, 51 Fed., 800.

The complaint in Hammer *v.* Dangenhart, 247 U. S., 251, was without averment as to citizenship and amount in controversy, Federal jurisdiction being claimed under paragraph 8 of section 24 of the Judicial Code, providing that the District Court shall have jurisdiction of

> "all suits and proceedings arising under any law regulating commerce."

The act under review, which is section 1900 of the act of Congress of February 4, 1919, was passed supposedly in pursuance of the constitutional power to raise revenue. It is a part of an act entitled "An act to provide revenue, and for other purposes," and the section itself in express terms undertakes to levy "an excise tax."

It may be that many of the decided cases on this point have dealt more directly with and have more immediately affected the revenue, being cases against a collector to recover taxes paid under protest or to enjoin a corporation at the suit of a stockholder from paying a tax. Is there in truth any more remoteness or indirection here than in a suit by a stockholder to prevent a corporation from paying an invalid tax? We do not think so; but if there is, we submit it is in degree and not in principle and is overcome by the need of the remedy by the wage-earner.

1b.

The Fact That the Employment is at Will Does Not Bar the Remedy.

Dignity of Right Impaired.

Consider the right impaired, its dignity and importance. Upon the security of this right depends the life and the happiness of a large portion of the people of this country. Why guarantee to the citizen the right to life, liberty, and the pursuit of happiness if his means of obtaining those things are without protection in the law?

A Property Right.

The right to earn a livelihood, and to have one's employment, whether it is at will or for a fixed period, free from interference resulting naturally from a void statute, is a property right.

Raich *v.* Truax, 219 Fed., 273, 283.

Truax *v.* Raich, 239 U. S., 33.

Triangle Film Corporation *v.* Arteraft Pictures Corporation, 250 Fed., 981, 982.

Being a property right, it is entitled to the protection of a court of equity in the absence of an adequate remedy at law.

14 R. C. L., 290.

Dr. Miles Medical Co. *v.* John D. Park & Son, 220 U. S., 373, 394.

Fort Smith & Western Railroad Co. *v.* Mills, 253, U. S., 206.

No Other Remedy

The wage-earner has a manifest and vital interest in the freedom of the employer to exercise his judgment and will as to the continuance of the employment, unaffected by the coercion of illegal action on the part of Congress touching or dealing with that employment. If the remedy is granted only to those wage-earners who are employed for a fixed period, the vast majority of laboring men and their opportunity to earn a livelihood are at the mercy of legislative bodies, free from the supervising power of the courts. It is plain that, if this plaintiff cannot, in a suit in equity, challenge the validity of this measure, then he and all others in like situation are without remedy of any kind in the courts.

Raich *v.* Truax, 219 Fed., 273, 283.

Right Interfered with Solely by Act.

Is it not apparent that the right of the employee to work will be interfered with solely by reason of the coercive effect of the act? The fact that his employer can discharge him at pleasure is not material, we submit, because the employer desires to continue the employment and would do so but for the provisions of the act.

Right Sought to be Protected.

The right for which protection is sought is the right of the employee that his employer shall be free from wrongful coercion with relation to the contract of employment. Whether the application of the coercive force is through the

prosecuting officer or through the act of the employer is, we submit, not controlling. The restraining hand of the court is laid upon the individual who immediately applies the force, provided only that such person's action is solely because of the act.

The gist of the matter is that existing contract relations, though at the will of the contracting parties, are free from unlawful interference on the part of others, whether those others are individuals acting upon their own initiative or upon compulsion of void legislation.

The strength of the appellee's position lies in the facts of his case and the situation in which he finds himself if his contention is not adopted, those facts and that situation being peculiar and distinctive in important particulars different from the facts of other cases and the situation of other persons.

Coercive Effect of Tax Law Same as Criminal Statute.

On principle, what is the difference between the coercive influence of a statute that prohibits conduct through the medium of the criminal law and one that prohibits the same conduct through the medium of a prohibitive tax? The result is the same—the conduct in question is outlawed and the wage-earner and his right to earn a livelihood is interfered with. There can be, we submit, no legal significance in the fact that in the former the restraint is put upon those who are about to apply coercive force of the act by prosecution, and in the latter the restraint is upon one of the parties to the contract to prevent him from doing an act to the injury of the other contracting party, which act he does not

want to do and would not do but for the compelling influence of the statute.

Section 3224, Revised Statutes.

Nor can the ground of distinction be, we argue, that you may enjoin a prosecuting officer, but cannot directly or indirectly enjoin a tax officer. For there are cases, notwithstanding section 3224 of the Revised Statutes, where a court of equity lends its aid by way of injunction to protect rights that would otherwise be impaired by a legislative enactment in the form of a tax.

Brushaber *v.* Union Pacific R. Co., 240 U. S., 1.
Flint *v.* Stone-Tracy Co., 220 U. S., 154.
Weeks *v.* Sibley, 269 Fed., 155.

In both cases the purpose is the same, viz., to ascertain the validity of the act, and, if it is found void, prevent its application to the prejudice of the plaintiff.

Invalidity of Tax Not Enough.

We are not to be understood as contending that the cases just cited proceed upon the theory that simply because there is an assertion of the invalidity of a tax that therefore the jurisdiction exists. There were other grounds in those cases just as there are other grounds of equity jurisdiction in this case, such as the absence of any other remedy and of irreparable injury.

Treasurer of Corporation and Superintendent of Mill on Same Footing.

The treasurer of a corporation, acting under the authority of the directors, because of a taxing statute, announces that he will pay out the money of the corporation in accordance with the mandate of the statute. The superintendent of a mill, acting for the owner, who desires to avoid paying out money in the shape of a tax, determines to do an act to the injury of one with whom he has contract relations, which, but for the act, he desires to continue. Why should an injunction lie in the first case and not in the second? The object in each is to have the act declared unconstitutional. The purpose in each is to protect a property right. In each there is an absence of an adequate remedy at law. In each there may be irreparable injury.

Truax v. Raich Controls.

It is our contention that in principle there is no difference between the act here under review and the act considered in Truax *v.* Raich, *supra*, the purpose and effect of each being to control labor conditions, one by prohibiting through the levy of a tax so large as to bring about a discharge of an employee and the other by subjecting the employer to the criminal law unless he does discharge the employee.

Wage-earner's Livelihood at Mercy of Congress.

If the fact that the employment is at will, and therefore the employer can discharge the employee without assigning

any reason, serves to prevent the application of the doctrine of Truax *v.* Raich, then it would seem that the right of the wage-earner to earn a livelihood is at the mercy of the legislative branch of the Government whenever it chooses to impose its will through the power to tax. Considering the tendency of the legislative branch to impose its will upon economic, industrial, and social conditions through the exercise of authority of doubtful validity, this presents an important question, so important that, if it is found necessary in order to give the employee his day in court, the general principles of the law should be applied, even though they have to be extended to meet a new situation and condition.

Absence of Exact Precedent.

If, in order to restrain a wrong or afford means of protecting a right, it is necessary to take a forward step, it should be taken unless there is likely to come out of that step more harm than good or some doctrine of the existing law stands as an insuperable obstacle.

10 R. C. L., 263.

21 C. J., 35.

This court said, in Dodge *v.* Woolsey, 18 How., 341:

> "The circumstances of each case must determine the jurisdiction of a court of equity to give the remedy sought."

Corbus v. Mining Co., 187 U. S., 455.

This was a suit by a stockholder against a corporation to enjoin the payment of a tax, the United States Attorney

appearing as *amicus curiæ*, raised the question of jurisdiction because (*a*) there was an adequate remedy at law, and (*b*) the suit was collusive. In denying the jurisdiction this court said, *inter alia:*

> "It is an effort to secure for the benefit of the corporation an injunction which it could not itself obtain and which no individual similarly situated could obtain."

Neither of the Objections Made in That Case Are or Could be Urged Here.

It is apparent there is no other remedy open to the employee and nothing appears here to challenge the good faith of the adversary nature of this suit. On the other hand, appellees were at pains to see that the questions involved should be discussed in an adversary proceeding. At once upon filing the complaint the Commissioner of Internal Revenue, the Solicitor General, and the District Attorney of the Western District of North Carolina were notified. In addition to what the appellees have done, the appellant has, it seems, surrendered to the Solicitor General the control of the defense.

We submit there cannot be said in this case what was said in the Corbus case, viz., that it is an effort to secure for the benefit of the corporation an injunction which it could not itself obtain. While an employee and employer may, and generally do, have a common interest in laws respecting the conditions of employment, yet it is not hard to imagine instances where their interests conflict. There may arise a case where the employer is in sympathy with the law and the employee is not.

Fundamental Basis of Equity Power is Present—Property Right Harmed Without Other Means of Redress.

In Hamer *v.* Dagenhart, *supra*, property rights, the same as here, would have been destroyed if the employer had not been relieved by an injunction of the impending purpose of the United States Attorney to indict the employer because the employer had made known its purpose to discharge the plaintiff to avoid prosecution. What is the difference in principle and in result to the wage-earner between action by the employer to his detriment brought about by a desire to avoid prosecution and a desire to avoid the payment of a tax? In one, harm could only come through the action of some third person, such as the United States Attorney. In the other, the harm is direct and immediate. But the result is the same to the wage-earner. He is threatened with discharge by the employer to avoid the legislative consequences of retaining him. The fundamental basis of equity power is present, viz., a property right harmed without other means of redress.

It is respectfully submitted that the facts of the case at bar come well within the test laid down in the Corbus case, *supra*, viz., that it should clearly and affirmatively appear that there is an absolute necessity for interfering in order to prevent irreparable injury.

It is respectfully submitted that the District Court had jurisdiction to hear this cause, and that the complaint states a case cognizable in equity for an injunction.

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